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Attorneys for Plaintiff Colorado Snack Foods, LLC

FILED  
U.S. DISTRICT COURT

2006 JAN 24 P 4: 25

DISTRICT OF UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COLORADO SNACK FOODS, LLC

Plaintiff,

v.

ROCKY MOUNTAIN KETTLE CORN,  
LLC

Defendant.

Judge Ted Stewart

DECK TYPE: Civil

DATE STAMP: 01/24/2006 @ 16:26:22

CASE NUMBER: 2:06CV00073 TS

COMPLAINT

JURY DEMANDED

Plaintiff Colorado Snack Foods, LLC, through counsel, alleges and complains  
against Defendant Rocky Mountain Kettle Corn, LLC as follows:

**INTRODUCTION**

1. This is an action for trademark infringement and unfair competition  
resulting from Defendant Rocky Mountain Kettle Corn's use of the phrase ROCKY  
MOUNTAIN KETTLE CORN as a trademark to market and sell a line of popcorn in

competition with Plaintiff's popcorn, which it sells under the trademark ROCKY MOUNTAIN POPCORN COMPANY. Despite being requested by Plaintiff to discontinue use of the infringing mark, Defendant has willfully continued to market and sell goods under ROCKY MOUNTAIN KETTLE CORN. Consequently, Plaintiff brings this action under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and supplemental state law, to enjoin Defendant's further violation of Plaintiff's trademark rights in the ROCKY MOUNTAIN POPCORN COMPANY trademark, and to disgorge all profits wrongfully received from use of the infringing trademark.

### **THE PARTIES**

2. Plaintiff Colorado Snack Foods, LLC is a Colorado Limited Liability Company having its principal place of business at 520 Stacy Ct., Unit D, Lafayette, Colorado, 80026. Colorado Snack Foods, LLC owns the trademark registrations to the ROCKY MOUNTAIN POPCORN COMPANY marks that are at issue in this case.

3. Upon information and belief, Defendant Rocky Mountain Kettle Corn, LLC ("Defendant") is a Utah Limited Liability Company having its principal place of business at 1874 N. 40 E, Orem, Utah, 84057. Defendant conducts business, advertises, sells, and distributes its products in Utah. Defendant's sales and distributions affect the commerce of the United States.

### **JURISDICTION AND VENUE**

4. This action arises under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331, 1338, and 1367.

5. Venue is proper in the District of Utah pursuant to 28 U.S.C. § 1391(b) and (c).

### **GENERAL ALLEGATIONS**

6. Plaintiff markets, distributes, and sells a variety of popcorn and snack foods nationwide.

7. Since at least as early as 1995, Plaintiff has continuously used the mark "ROCKY MOUNTAIN POPCORN COMPANY" in commerce in connection with the nationwide advertising and sale of popcorn and snack foods.

8. Plaintiff has received two trademark registrations from the United States Patent and Trademark Office ("USPTO") for its ROCKY MOUNTAIN POPCORN COMPANY trademark:

Mark	Registration No.	Date of Registration	Goods Description
ROCKY MOUNTAIN POPCORN COMPANY (word only)	2,773,547	October 14, 2003	Popped popcorn
ROCKY MOUNTAIN POPCORN COMPANY & Design	2,301,900	December 21, 1999	Popped popcorn

9. Copies of Plaintiffs' two trademarks registrations for ROCKY MOUNTAIN POPCORN COMPANY are attached as *Exhibit 1*.

10. Pursuant to 15 U.S.C. § 1065, Plaintiff's trademark rights to ROCKY MOUNTAIN POPCORN COMPANY and Design has become incontestable.

11. Plaintiff has expended considerable effort and expense advertising, marketing, and promoting the mark in the United States. Consequently, the public has come to recognize and rely on the ROCKY MOUNTAIN POPCORN COMPANY mark and the mark has gained a valuable reputation.

12. Plaintiff's trademark ROCKY MOUNTAIN POPCORN COMPANY is inherently distinctive or has acquired distinctiveness through Plaintiff's continued and extensive use of the mark on its popcorn and snack foods.

13. In 2005, Plaintiff became aware that Defendant was using the term "ROCKY MOUNTAIN KETTLE CORN" to market and sell a line of popcorn and snack foods. Defendant's ROCKY MOUNTAIN KETTLE CORN products contain the same or similar ingredients as those contained in Plaintiff's ROCKY MOUNTAIN POPCORN COMPANY products. Indeed, Plaintiff markets and sells kettle corn within its line of popcorn products sold under its ROCKY MOUNTAIN POPCORN trademark.

14. Defendant's ROCKY MOUNTAIN KETTLE CORN trademark is confusingly similar to Plaintiff's registered ROCKY MOUNTAIN POPCORN COMPANY trademarks, as both marks feature the identical terms ROCKY MOUNTAIN, and KETTLE CORN and POPCORN have overlapping meanings and are visually and phonetically similar. As such, both marks are similar in appearance, verbal pronunciation, and commercial impression.

15. Plaintiff's and Defendant's products are both sold and marketed as snack food products to the same general class of consumers.

16. After Defendant began using the phrase ROCKY MOUNTAIN KETTLE CORN as a trademark, Plaintiff began receiving inquiries from customers and potential customers who were actually confused into believing that Plaintiff and Defendant were the same or related companies.

17. In May, 2004, Defendant attempted to register its mark ROCKY MOUNTAIN KETTLE CORN with the USPTO by filing a trademark application. Upon examination of Defendant's application, the USPTO rejected Defendant's mark based on a finding that it creates a likelihood of confusion with Plaintiff's registered marks. Thereafter, Defendant abandoned its trademark application, yet still continued to make actual use of its infringing mark in commerce.

18. At no time has Plaintiff given Defendant consent, license, or authorization to use the phrase ROCKY MOUNTAIN KETTLE CORN.

19. In 2005, Plaintiff notified Defendant that its use of the mark ROCKY MOUNTAIN KETTLE CORN was causing actual confusion, and was likely to cause consumer confusion, about the source, affiliation or sponsorship of Defendant's products. Accordingly, Plaintiff demanded that Defendant discontinue its use of the infringing mark ROCKY MOUNTAIN KETTLE CORN.

20. Despite being unequivocally warned and put on notice of Plaintiff's senior rights to the ROCKY MOUNTAIN POPCORN COMPANY trademark for snack foods

and popcorn, Defendant has refused to stop and has willfully continued use of the infringing ROCKY MOUNTAIN KETTLE CORN mark. .

**FIRST CAUSE OF ACTION**  
**(TRADEMARK INFRINGEMENT UNDER § 32 OF THE LANHAM ACT)**

21. Plaintiff re-alleges and incorporates by this reference the preceding allegations of the Complaint.

22. Plaintiff possesses two valid registrations issued by the United States Patent and Trademark Office for ROCKY MOUNTAIN POPCORN COMPANY (one of which is incontestable): Registration Nos. 2,773,547 and 2,301,900 for popped popcorn. Copies of Plaintiff's ROCKY MOUNTAIN POPCORN COMPANY trademark registrations are attached as *Exhibit 1*.

23. Defendant's actions as described above, and specifically Defendant's unauthorized use of the ROCKY MOUNTAIN KETTLE CORN mark to identify and promote its products, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin, sponsorship or approval of Defendant's ROCKY MOUNTAIN KETTLE CORN product by Plaintiff. Defendant's conduct constitutes trademark infringement in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114.

24. Defendant's trademark infringement has caused and continues to cause irreparable injury to the value and goodwill of Plaintiff's trademark, as well as irreparable injury to Plaintiff's business, goodwill, and reputation. Plaintiff has no adequate remedy at law because damages are continuing and difficult to ascertain.

25. Defendant's continued use of its ROCKY MOUNTAIN KETTLE CORN trademark is deliberate, willful, fraudulent, and constitutes a knowing infringement of Plaintiff's mark. Plaintiff, therefore, is entitled to disgorgement of Defendant's profits and attorneys' fees and costs incurred in this action, along with prejudgment interest.

**SECOND CAUSE OF ACTION**  
**(TRADEMARK INFRINGEMENT UNDER § 43(a) OF THE LANHAM ACT)**

26. Plaintiff re-alleges and incorporates by this reference the preceding allegations of the Complaint.

27. The Defendant's actions as described above, and specifically Defendant's unauthorized use of the ROCKY MOUNTAIN KETTLE CORN mark to identify and promote its products is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin, sponsorship or approval of Defendant's ROCKY MOUNTAIN KETTLE CORN products by Plaintiff. Defendant's conduct constitutes the use of a false designation of origin and false descriptions and representations in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

28. Defendant's false designation of origin and false descriptions and representations have caused and continue to cause irreparable injury to the value and goodwill of Plaintiff's trademark, as well as irreparable injury to Plaintiff's business, goodwill, and reputation. Plaintiff has no adequate remedy at law because damages are continuing and difficult to ascertain.

29. Defendant's continued use of the ROCKY MOUNTAIN KETTLE CORN trademark is deliberate, willful, fraudulent, and constitutes a knowing infringement of Plaintiff's mark. Plaintiff, therefore, is entitled to disgorgement of Defendant's profits and attorneys' fees and costs incurred in this action, along with prejudgment interest.

**THIRD CAUSE OF ACTION**  
**(UTAH DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)**

30. Plaintiff re-alleges and incorporates by this reference the preceding allegations of the Complaint.

31. The Defendant's actions described above, and specifically Defendant's use of the mark ROCKY MOUNTAIN KETTLE CORN on its products, have caused or are likely to cause confusion or misunderstanding by actual and prospective purchasers and customers regarding the true source, sponsorship, approval, affiliation, connection, or association of the Defendant's product. This conduct constitutes a deceptive trade practice and/or deceptive or misleading advertising practice in violation of Utah Code Ann. § 13-11a-1 *et seq.*

32. Defendant's deceptive trade practices and/or deceptive or misleading advertising practices have caused and continue to cause irreparable injury to the value of Plaintiff's ROCKY MOUNTAIN POPCORN COMPANY mark, as well as irreparable injury to Plaintiff's business, goodwill, and reputation. Plaintiff has no adequate remedy at law because Defendant's actions are continuing and damages are difficult to ascertain.



33. Plaintiff gave notice to the Defendant of its infringement of Plaintiff's mark and Defendant has refused to cease its infringing activity. Thus, Plaintiff is also entitled to an injunction against the Defendant pursuant to Utah Code Ann. § 13-11a-4(2).

**JURY DEMAND**

Plaintiff requests a trial by a jury of all issues.

**PRAYER FOR RELIEF**

Plaintiff prays for the following relief and requests that:

- a. The Court grant preliminary and permanent injunctive relief enjoining the Defendant and each of its officers, directors, agents, servants, and employees, and all others aiding, abetting, or acting in concert with and having knowledge thereof, from using the mark ROCKY MOUNTAIN KETTLE CORN or ROCKY MOUNTAIN POPCORN COMPANY or any other mark confusingly similar thereto in connection with the promotion, sale, or offer of sale of snack foods or popcorn products;
- b. The Court order that Defendant account to Plaintiff for all sales, revenues, and profits derived from sale of products under the infringing ROCKY MOUNTAIN KETTLE CORN trademark, and that all such profits be disgorged and paid to Plaintiff;
- c. The Court order Defendant to withdraw and recall all infringing literature, packaging, advertising material, labels, and other items bearing the mark

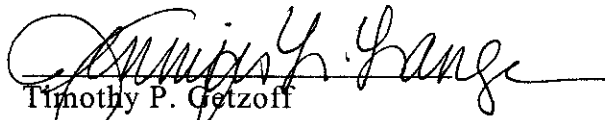
ROCKY MOUNTAIN KETTLE CORN, and either deliver those materials to Plaintiff for destruction or arrange for their destruction in a manner acceptable to Plaintiff;

d. The Court order the Defendant to conduct corrective advertising sufficient to inform the consuming public that there is no connection between Plaintiff and the Defendant.

e. The Court award Plaintiff the costs of this action and reasonable attorneys' fees and expenses;

Dated this 24<sup>th</sup> day of January, 2006

Respectfully submitted,

  
Timothy P. Getzoff  
Jennifer L. Lange  
HOLLAND & HART LLP

**ATTORNEYS FOR PLAINTIFF  
COLORADO SNACK FOODS, LLC**

Plaintiff's Address:  
520 Stacy Ct., Unit D  
Lafayette, Colorado, 80026

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JS 44 (Rev. 11/04)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**  
Colorado Snack Foods, LLC

**(b) County of Residence of First Listed Plaintiff** Boulder County, CO  
(EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorney's (Firm Name, Address, and Telephone Number)**

Timothy P. Getzoff & Jennifer L. Lange, Holland & Hart LLP  
60 E. So. Temple, Suite 2000 SLC, UT 84111 (801)595-7800

**DEFENDANTS**

Rocky Mountain Kettle Corn, LLC

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**FILED**  
U.S. DISTRICT COURT

2006 JAN 24 P 4:25  
Utah County, UT

DISTRICT OF UTAH

BY: DEPUTY CLERK

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- PTF DEF**  
Citizen of This State ☐ 1 ☒ 1  
Citizen of Another State ☒ 2 ☐ 2  
Citizen or Subject of a Foreign Country ☐ 3 ☐ 3  
**PTF DEF**  
Incorporated or Principal Place of Business in This State ☐ 4 ☒ 4  
Incorporated and Principal Place of Business in Another State ☒ 5 ☐ 5  
Foreign Nation ☐ 6 ☐ 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

**V. ORIGIN**

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
15 U.S.C. 1051

Brief description of cause:  
Trademark infringement and unfair competition

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

**DEMANDS**

Injunctive Relief

CHECK YES only if demanded in complaint:

**JURY DEMAND:** ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

1/24/06

SIGNATURE OF ATTORNEY OF RECORD

*Timothy P. Getzoff*

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

Judge Ted Stewart

DECK TYPE: Civil

DATE STAMP: 01/24/2006 @ 16:26:22

CASE NUMBER: 2:06CV00073 TS